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IN THE ILLINOIS COMMERCE COMMISSION
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Springfield, IL 62701

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FEB 8 2005

Illinois Commerce Commission
RAIL SAFETY SECTION

UNITED TRANSPORTATION UNION -
ILLINOIS LEGISLATIVE BOARD,

against

KANSAS CITY SOUTHERN RAILROAD

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Case: T04-0027

CLOSING REBUTTAL BRIEF OF THE UNITED TRANSPORTATION UNION

NOW COMES the UNITED TRANSPORTATION UNION, by and through its attorneys, HISKES, DILLNER, O'DONNELL, MAROVICH & LAPP, LTD., and for its Rebuttal Brief states as follows:

This Court has now heard two days of testimony, received briefs from the UTU, ICC staff and the KCS. This case involved a complaint from the UTU that its locker room and lunch room facilities were not provided for nearly a month, were provided with violations of the administrative code up to the present time and have never been provided with adequate facilities to this very day. Subject matter of this complaint may be mundane, since it deals with locker rooms, lunchrooms, washrooms and shower facilities. However, the fact of the matter remains that the facilities which are being complained of are important to the men and women who use them on a daily basis.

From the very first letter written by the UTU to the KCS through the hearing and briefing of this case, the UTU position has not changed. The UTU has steadfastly attempted to appeal to the KCS, ICC staff and this Court to apply common sense, require the KCS to provide plans (before implementation of changes) and to stop the attempts at gerrymandering retrofitting at the

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facility which simply ekes out technical compliance with a technical reading of Administrative Code provisions.

Common sense is a term which has been used by the UTU and the ICC staff to describe how Code provisions should be applied and enforced.

- *Common sense dictates that a locker room should be an area which can conveniently be used for its intended purpose of changing clothes.*
- *Common sense dictates that if a grown person is changing their clothes or returning from showering that proper furniture or benches should be provided and arranged for the intended purpose of drying themselves or to put on or take off pants and shoes.*
- *Common sense dictates that when a person is using their locker they should have space to comfortably turn around and also to allow someone else who is using a locker in close proximity to also have space to do the things that person needs to do.*
- *Common sense dictates that an employee should be able to utilize his locker without being struck by the bathroom door opening.*
- *Common sense dictates that when a facility is to be utilized by some 61 employees if one person is using the restroom another person should be able to use the shower.*
- *Common sense dictates that when a facility is to be utilized by some 61 employees if one person is using the shower another person should be able to access the sink or toilet in the restroom.*
- *Common sense dictates that if a female employee wishes to shower they should not have to cross an area of 50-75 feet outside in order to reach the shower.*
- *Common sense dictates that if a female, who is finishing her shift at night, wishes to shower she should not have to transverse 50-75 feet of outside area in order to reach the shower and then have to transverse the same distance to return to her dressing area in a separate facility.*
- *Common sense dictates that a female who wishes to shower in the dead of winter should not have to transverse 50-75 feet of the winter elements to reach the shower from her locker area, and then make the return trip.*
- *Common sense dictates that there should be an exhaust fan in the restroom, especially when that restroom is a combination restroom and shower stall and it*

has no window. (Of course, the KCS did finally install an exhaust fan in the washroom. However, this did not take place until sometime in January of 2004 and only after the first inspection by ICC staff.)

- Common sense dictates that an area designed as a lunchroom should have a door that closes that area from a restroom and a locker room and prevents the viewing of those employees who may be changing clothes in the locker room.
- Common sense dictates that if a lunch room is to be jointly used as a tie-up room or for other additional purposes it should be designed large enough to accommodate all of those purposes.
- Common sense dictates that where there are vents for circulation and a return of heated or cooled air those vents should not be covered up by lockers as they currently are today.
- Common sense dictates that where there are windows in a facility those windows should not be covered up by lockers.
- Common sense dictates that where rooms are separated by a wall and standard 36 inch door the two rooms are not magically converted into a single room by removing the door.
- Common sense dictates that where you have 61 employees who are entitled to have locker facilities you should provide the lockers and space for 61 employees.

The second theme which the UTU has steadfastly adhered to in these exchanges with the KCS is that the KCS used very poor planning in its demolition of the prior locker facility and set up of the new facility. The KCS, in its brief, makes it abundantly clear to this Court that it should receive kudos and bonus points for voluntarily demolishing the former facility. Obviously, the UTU applauds this positive action and said so in its first correspondence to the UTU. However, whatever kudos the KCS earned with its plan to demolish the old facility were quickly lost with its lack of planning for what it would do once the old facility was reduced to rubble and hauled away. One of the single most salient facts in this whole proceeding was the fact that the trailer which is currently serving as the locker room was in KCS possession 6 months prior to the demolition of the old facility. In other words, KCS could have performed

retrofitting on this trailer prior to the time it was moved onto the remaining slab from the old facility. From the point of view of the KCS, although they obviously do not want to admit this, they had the opportunity to plan the layout of the trailer and to actually do things like install exhaust fans prior to the time the trailer was to be used by the employees. The trailer is 56 feet long by 11 feet wide, with separate rooms. It would not have been a Herculean effort to put pencil to paper and determine that a tie up room, lunchroom and locker rooms and a washroom/shower combination was going to be like putting the proverbial eight pounds of groceries in a four pound bag. This may sound foreign to the KCS, but during the time that the trailer was sitting in the parking lot of the facility, whatever plans the KCS had for space utilization in this trailer could have been shared with the UTU and the ICC. However, as the KCS testimony and brief make it abundantly clear, KCS would have “honest differences of opinion” as to how the trailer should be laid out and utilized and in the end, the KCS would do what they wanted to anyway.

It is truly amazing that the KCS continually tried to divert blame or liability for the lack of facilities after the demolition of the old building by pointing to “problems” in getting the new facility ready to use. However, at no time has the KCS come forward with any documentation that it had a plan for making the switch over the trailer. Mr. Haney, the sole representative of the KCS who testified at the hearing testified that he did not know anything about the plans for the demolition of the old building and set up of the trailer outside of the fact that the KCS believed it should take four days. KCS’s position, in other words, was that this court should cut them some slack on the substantial amount of time that the employees had no facility or a facility that was in disarray and lacked simple, rudimentary necessities such as functional plumbing, exhaust fans, lunchroom furniture and locker room furniture because the KCS had problems getting the trailer

up and running. For six months this trailer sat in the parking lot, the UTU, ICC staff and this Court have not been favored by the KCS with even one page of handwritten notes indicating what, if any, plan the KCS had for turning their leased construction trailer into a locker facility for its employees.

This is probably a good time to reiterate that UTU has never taken the position that a trailer or another preconstructed facility could not serve perfectly well as a locker room facility. It could very well be that a properly laid out and equipped trailer or modular unit would work just fine. It goes without saying that if the KCS had built a 56 feet by 11 feet building out of mortar and brick and laid it out exactly as the trailer in this case is laid out that the permanently constructed building would not pass muster. It is not the building, necessarily, but the use and design of the building. Would anyone really construct a building out of brick with windows and then block almost all the windows with lockers? The answer is a resounding no. If you were going to build a building out of brick you would have some plans for windows, plumbing, electricity, ventilation and other components that go into the construction. It should not come as a surprise that you can probably have a trailer or modular unit constructed to your specs. However, there is a huge difference between having the forethought to plan and order a trailer which fits your needs and taking a run of the mill construction trailer and trying to gerrymander it to be a locker room, lunchroom, tie up room and restroom.

The third theme that has been running through these proceedings is that the entire layout and utilization of the trailer has been gerrymandered from the beginning.

- The trailer does not allow for a separate washroom and shower facility so KCS gerrymanders a washroom/shower facility that only allows one person to utilize either facility at one time.
- The lunchroom does not provide enough room for a small table and three chairs and a door which can be closed so the locker room, or someone changing clothes,

is not visible to someone taking a lunch; so KCS gerrymanders the room by pinning the door against the wall so that it remains open at all times.

- The lunchroom is not equipped with an exhaust fan, so KCS gerrymanders a tortured explanation to this Court describing the possibility of opening windows and using the heating and air conditioning system to somehow move exhaust out of the building. (This argument becomes even more bizarre given the fact that two major vents in the trailer and more than half of the windows continue to be fully covered by lockers.)
- The locker room does not have benches or chairs convenient for use by those changing their clothes. The KCS hasn't even attempted to gerrymander around this shortfall.
- The two locker rooms have a solid wall between them so the KCS removes a 36 inch door between the rooms and magically gerrymanders two rooms into one single room.
- Vents at floor level for the circulation of heated and air conditioned air are covered up by lockers. Once again, the KCS does not even attempt to gerrymander around this situation but simply leaves the lockers in place hiding the vents.
- No separate dressing facility is provided in the trailer for females so the KCS gerrymanders three lockers in a separate washroom in the Superintendents trailer.
- The female employees who wish to shower have no shower facility adjacent to their lockers so the KCS gerrymanders a scenario whereby female employees are expected to walk 50 to 75 feet, outside, in the elements, possibly at night, to the lone shower stall in the trailer where the men's locker room is housed. (And then the KCS requests that this Court take judicial notice that such a set up is reasonable).
- The KCS originally stuffs upwards of 75 lockers into the trailer, reduces this number down to 62 and gerrymanders the layout of the lockers so that the KCS actually has the nerve to state that it is adequate (covered windows, covered vents, widths between locker rows barely wide enough for a man to turn around).
- The KCS can't even eke out the absolute minimum square footage required by the Administrative Code for the number of lockers in the two locker rooms so the KCS gerrymanders an argument that the two rooms are actually one single room.

- The KCS cannot provide the bare minimum square footage for the 62 lockers in the two lockers rooms so the KCS gerrymanders an argument that the language of the Administrative Code only requires them to provide a locker for those employees who have requested a locker be “assigned” to them, thereby reducing the required number of lockers down to 36. (The only support for the KCS number of “assigned” lockers was the testimony of Mr. Haney, who did not produce one scrap of paper where such a tally may have been memorialized. This testimony of Mr. Haney is substantially overshadowed by the fact that there are 62 lockers in the locker rooms which equal the number of male employees, minus three lockers for storage, minus the female lockers in the separate trailer. Regardless, as a part of this proceeding the UTU has read into the record the names of 61 employees and requests on behalf of these employees that, at a minimum, the facility allow for the assignment of a locker for each employee.)

Can it really be said by the KCS that they really believe that 36 lockers is the proper number after the UTU filed this complaint and the ICC staff inspections have steadfastly maintained that the square footage did not support the 62 lockers?

In the end, of course, it will be the province of this Court to decide the issues involved in this case. It is and has been the UTU’s position from the start that the KCS continuously run afoul of common sense, that they did not prepare, review or implement proper or any plans at all in setting up the trailer and that their attempts at gerrymandering around the provisions of the Administrative Code would turn those provisions on their heads if allowed to pass muster by this Court.

The brief of ICC staff is on all fours with that of the UTU. Staff’s brief argues, “The East St. Louis facility lacks adequate locker room space.” UTU concurs, yet believes it is imperative that if a new facility is constructed or if there is any reconfiguration of existing locker space that plans be submitted, reviewed and approved in advance. Any new design should ensure that the new layout results in a functional locker room, with required furniture properly located to ensure its convenient usage, and that the heating, air-conditioning and ventilation systems are not encumbered by lockers fully covering vents and windows. Likewise, lockers

should be configured in such a manner to ensure necessary clearance to protect employees from being struck by opening doors. And, at a minimum, it should be designed to meet the needs of no less than the 61 employees entitled to lockers as read into the record at the time this matter was heard.

Staff further argues, "The East St. Louis facility does not provide adequate ventilation in the lunchrooms." Again, UTU concurs. However, the ventilation system of the entire facility must be questioned given that major components of the ventilation system (windows and air vents) remain encumbered, fully covered by lockers, and therefore cannot function for their intended purpose.

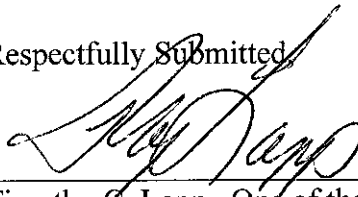
Lastly staff argues, "The Kansas City Southern Railway failed to provide adequate facilities for its employees" and "for a period of approximately 1 month there was no facility in place and that for a period of time even after the facility was open for use it was in such poor condition that it was unusable for its intended purpose. The employees deserve better." UTU couldn't agree more. The blatant disregard for the code and failure to plan and communicate with the parties in advance cries out for sanctions. KCS does not get to choose to comply with the mandates of the codes only when it is convenient to do so. Indeed, the employees deserve better than what they were given when they had no or very spartan quarters.

KCS accuses UTU of being unreasonable in pursuing this complaint and it's requests for relief. On the contrary, nothing could be more reasonable than to design and plan for the needs of the 61 employees at East St. Louis in a comprehensive manner. And it is reasonable to share information and those plans in advance with those who must utilize the facility (UTU) and allow review and approval by the regulatory agency with jurisdiction (ICC). Likewise, it is reasonable

to expect that those facilities will function for their intended purpose, and be usable by the employees who need them on a daily basis.

For all of the evidence adduced at hearing contained in the records, for all the arguments made in the UTU closing and for the arguments set forth in this Rebuttal, the UTU respectfully prays that this Honorable Court grant the UTU all relief prayed for in its Formal Complaint and its Closing Brief.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Timothy C. Lapp', written over a horizontal line.

Timothy C. Lapp. One of the Attorneys
for the United Transportation Union

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